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No. 739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

HOWARD J. MEISTER,

Petitioner,

v.

STATE OF WISCONSIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAkeview 5-6581

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

Norman C. Skogstad, on behalf of Howard J. Meister, respectfully petitions this honorable Court for a Writ of Certiorari to review the denial by the Supreme Court of the State of Wisconsin, of the Petitioner's application for a Writ of Prohibition directed to the Circuit Court of Dane County Wisconsin.

OPINIONS BELOW

The Supreme Court of the State of Wisconsin did not write an opinion.

JURISDICTION

On September 26, 1966, the Supreme Court of the State of Wisconsin denied the Petitioner's application for a Writ of Prohibition directed against the Circuit Court of Dane County Wisconsin. The jurisdiction of this honorable Court is invoked under 28 U.S.C. 1257 (3).

The denial of said Petition is a final disposition of the prohibition proceedings and the Supreme Court of the State of Wisconsin is the highest Court in that State, in which decision on that case could be had.[1]

QUESTIONS PRESENTED

A. Was the Petitioner denied due process of law under the Fourteenth Amendment of the United States Constitution when the Court denied him the right to call witnesses in an attempt to establish that the Assistant Attorney General of the State of Wisconsin, who instigated and conducted the Grand Jury which indicted the Petitioner, acted out of personal malice toward the Petitioner and used the Grand Jury as a means of furthering his personal vendetta?

B. Whether the Indictment, as returned by the Grand Jury, sets forth sufficient facts to constitute the crime charged and confer jurisdiction upon the Court?

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[1] See: *Madruga* v. *Superior Court* [1954] 346 U.S. 556; *Rescue Army* v. *Municipal Court* [1947] 331 U.S. 549.

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

The Statutes involved in this petition are: Wis. Stats. 946.10, Wis. Stats. 939.05, and Wis. Stats. 939.30. These statutes are set forth in Appendix C, *infra* p. App. 4. The Constitutional provision involved is the 14th Amendment of the U. S. Constitution, which states as follows:

> "Article XIV. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF CASE

LeRoy L. Dalton, an Assistant Attorney General of the State of Wisconsin, accumulated evidence of alleged criminal activity in late 1965 and early 1966, which he presented to the District Attorney of Dane County and which resulted in the calling of the Grand Jury by Circuit Court Judge Richard W. Bardwell, of the Circuit Court of Dane County, Wisconsin (R. 89), Assistant Attorney General LeRoy Dalton participated, along with the District Attorney of Dane County, Wisconsin, and conducted the Grand Jury, assisting in the questioning of witnesses before the Grand Jury and the presentation of evidence (R. 89).

On June 17, 1966, the said Grand Jury returned a True Bill against the Petitioner (R. 20). (Appendix B, *infra*, pages App. 2-3). Arraignment was set for June 22, 1966 (R. 23) and at that time counsel for the Petitioner appeared and informed the Court of his intention to file a Motion to Dismiss the Indictment (R. 23). Further proceedings were had on June 27, 1966, at which time counsel for the Petitioner filed his Motions to Dismiss the Indictment. At that time, counsel for the Petitioner advised the Court of his intention to call witnesses in support of the factual issues raised by the Motions to Dismiss and the Court indicated that this might be necessary (R. 32). This hearing was then adjourned to July 26, 1966 at 12:30 P.M. (R. 47).

Counsel for the Petitioner was advised by the Court and by co-counsel that the hearing on July 26, 1966, at 12:30

P.M. was merely to be in the nature of a pretrial in order to lay down procedural guidelines and that it would not be necessary for counsel for the Petitioner to have his witnesses present at that time (R. 118, 120, 47). At this hearing, counsel for the Petitioner repeatedly asserted the importance to his client's rights of the necessity for the taking of testimony and particularly that of Assistant Attorney General LeRoy Dalton (R. 55, 56, 57 and 60). However, at this hearing the Court decided the bulk of the issues raised by the Petitioner, including those raised herein, without permitting the Petitioner to call witnesses (R. 74-80). The proceedings were then adjourned to September 14, 1966 (R. 86).

On September 7, 1966, the Petitioner caused to be served upon Assistant Attorney General LeRoy L. Dalton, a Subpoena to appear and testify as a witness before the Court at the adjourned date of the hearing on September 14, 1966 (R. 99). Whereupon, LeRoy L. Dalton brought an Order to Show Cause, returnable on September 12, 1966, before the Honorable Edwin M. Wilkie (R. 88). At the hearing on this Order to Show Cause, Judge Wilkie quashed the Subpoena, holding that the testimony of Mr. Dalton would go to matters on which the Court had already ruled (R. 111).

On September 14, 1966, Petitioner appeared in the Circuit Court of Dane County for a determination of the balance of the Motions to Dismiss and at that time, not having the right to call Mr. Dalton and others as witnesses, filed his Affidavit (R. 117-119), and an Affidavit and Offer of Proof (R. 123-125), setting forth the facts which he expected to prove through the testimony of Assistant Attor-

ney General LeRoy Dalton. Thereafter, the Court denied the balance of the Motions made by the Petitioner for Dismissal of the Indictment (R. 137), and set the arraignment of the defendant for September 26, 1966.

On September 26, 1966, the Petitioner petitioned the Supreme Court of the State of Wisconsin, for a Writ of Prohibition directing the Honorable Edwin M. Wilkie, Circuit Judge of the Circuit Court of Dane County to refrain from any further proceedings in the action, raising among other things the participation in the Grand Jury by Assistant Attorney General LeRoy L. Dalton and the fact that the Indictment was fatally defective so as not to confer jurisdiction upon the Court (R. 6). The application for the Writ was denied (R. 16). (Appendix A, *infra*, page App. 1).

REASONS FOR GRANTING THE WRIT

A. Upon the return of the True Bill against the petitioner, counsel for the petitioner promptly moved the court to dismiss the indictment. Several grounds for dismissal were raised, among which was the impropriety of the Assistant Attorney General LeRoy Dalton's instigation of and participation in the Grand Jury proceedings. Counsel for the petitioner, from the very outset, repeatedly called the court's attention to the necessity of proof and the taking of testimony to support this ground for dismissal of the indictment. (R. 32, 55, 56, 57, 60). The court denied the defendant's motion in this regard without permitting him to produce testimony. The court held in effect that while there may have been irregularities in the Grand Jury proceedings the defendant may not collaterally attack the Grand Jury proceedings. (R. 145).

In commenting upon the nature and the purpose of the Grand Jury proceedings, this court in *Wood* v. *Georgia* (1962) 370 U.S. 375 at page 390 commented as follows:

> "Historically, this body has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, whether the latter be an individual, minority group, or other, to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

If as stated above, the primary purpose of the Grand Jury is to guard the individual against malicious and oppressive persecution and to stand between the accuser and the accused, then it would appear that it must fulfill

that function in order to meet the requirements of due process. Due process is that fundamental fairness which is essential to the very concept of justice. *U. S.* v. *Myers*, 327 Fed. 2d 174 (1964); *Linden* v. *Dickson* (1961) 287 Fed. 2d 55. An asserted denial of due process must be tested by the totality of the facts in the case. *Betts* v. *Brady*, 316 U.S. 455 at 462 (1942).

If a prosecutor, motivated by personal dislike and personal malice against an individual convenes and uses a Grand Jury as a tool with which to secure an indictment against that individual then it cannot be said that the above mentioned purpose of the Grand Jury has been fulfilled or that the individual has had a fair Grand Jury hearing as required by the Due Process Clause of the Fourteenth Amendment of the United States Constitution.[2]

In the instant case counsel on behalf of the petitioner filed an offer of proof in which it was stated that he had contacted witnesses and accumulated information, which information if correct indicated that the Assistant Attorney General LeRoy Dalton had known the defendant over a number of years, had a personal dislike and personal vendetta against the defendant, that prior to the convening of the Grand Jury which indicted the defendant, had stated that he would "get Meister", that he has used his office as an Assistant Attorney General in an attempt to coerce an administrative agency of the State of Wisconsin to take steps to harass the defendant, had told at least one witness, "even if you have to stretch it, we have to get

[2] The actions of a state official (even though he misuses the power of the state) are to be deemed the actions of the state under the Fourteenth Amendment of the Constitution. (See *Ex parte Virginia*, 100 U.S. 339 at 347, *Mooney* v. *Holohan*, 294 U.S. 103; *Home Telephone Co.* v. *Los Angeles*, 227 U.S. 278.

Meister," and that his interrogation of many witnesses was directed toward the purpose of "getting Meister" (R. 123-125). This, coupled with the fact that Assistant Attorney General LeRoy L. Dalton accumulated the alleged evidence that was submitted to the Grand Jury, instigated the Grand Jury, and participated in the conduct of the Grand Jury (presumably determining which evidence would be presented to the Grand Jury) (R. 89) creates grave doubts as to whether the petitioner was granted a fair Grand Jury hearing, whether the purposes of the Grand Jury as stated above were fulfilled, and gives rise to the inference that the Grand Jury was used as a tool by the Assistant Attorney General LeRoy L. Dalton.

In view of the foregoing facts, it is submitted that the petitioner has a right, guaranteed by the Fourteenth Amendment of the U. S. Constitution, to inquire into the Grand Jury to determine whether he has received a fair Grand Jury hearing. This Court, in the case of *Carter* v. *Illinois*, 1946, 329 U.S. 173 at p. 175, stated as follows:

> "A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holohan*, 294 U.S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record."

Under the facts of the present case, inquiry into the basic fairness of the Grand Jury proceedings must begin with the examination of LeRoy L. Dalton. The Court, by precluding the petitioner from calling Attorney General Dalton as a witness, denied the petitioner the right to effectively

inquire into the propriety of the Grand Jury proceedings.[3] If the petitioner is precluded at this time from inquiring into the integrity of the Grand Jury proceedings, then he will not be able to raise this issue at any later stage of the proceedings.

Without an opportunity to inquire into the activities of Assistant Attorney General LeRoy L. Dalton in connection with the Grand Jury, the totality of the facts in the case is not before a Court for review of the issue of whether the petitioner has had a fair Grand Jury proceeding so as to meet the requirements of due process of law. This constitutes a violation of the petitioner's right of procedural due process of law, as guaranteed by the Fourteenth Amendment of the U. S. Constitution.

B. The Indictment seeks to charge the substantive offense of bribery under Wis. Stat. §946.10. The factual allegations of the Indictment set forth that on or about the 29th day of June, 1965, in the City of Madison, Dane County, Wisconsin, the petitioner directed one, Dorothy Effinger to offer to one, Earl Elfers, a sum of money to influence his conduct in relation to the matters of legislation pending before him. The Indictment continues, stating that the said Dorothy Effinger did make such offer to the said Earl Elfers. There is no allegation as to when or where the said offer was made. In brief, the Indictment charges the defendant with directing another to commit a crime.

At common law, this would make the petitioner an accessory before the fact. Wis. Stat. § 939.05 abolishes acces-

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[3] To compound the unfairness in the Court's ruling, the Court after precluding the petitioner from examining Assistant Attorney General LeRoy L. Dalton, permitted Mr. Dalton to file an affidavit in opposition to the offer of proof filed by the petitioner's counsel. (R. 149).

sories and provides that where one is party to the crime, he can be charged with the substantive crime itself. However, it is necessary to have a consummated crime before one who is a party thereto may be charged with the substantive offense, *State* v. *Nutley,* 24 Wis. (2d) 527; 129 N.W. (2d) 155. Without a consummated crime, the party must be charged with the inchoate offense of solicitation, conspiracy or attempt. The Indictment in the present case is vague and indefinite as to whether it charges the defendant as a principal to a crime under Wis. Stat. §939.05, or whether it seeks to charge him with soliciting a crime under Wis. Stat. § 939.30. The act alleged on the part of the defendant, to-wit: that he directed one, Dorothy Effinger to offer a sum of money, can be the basis of the substantive, inchoate crime of solicitation under Wis. Stat. § 939.30 or, if there is a consummated crime, it can be the basis of a charge of the substantive consummated crime itself under the Parties to a Crime Statute, Wis. Stat. § 939.05.

Until an offer is made, there can be no consummated crime of bribery. Under the facts, as set forth in the Indictment, there is no time or place stated as to where the alleged offer took place. The offer could have taken place outside of the State of Wisconsin. In that case, there would be no consummated offense of bribery within the State of Wisconsin, or subject to its jurisdiction. The offense, if any, would have to be charged as the inchoate, substantive crime of solicitation under Wis. Stat. § 939.30.

The Indictment sets forth a True Bill as to a crime of bribery under Wis. Stat. § 946.10. The facts set forth in the True Bill do not substantiate that a consummated crime of bribery was committed within the State of Wisconsin, since there is no venue ascribed to the alleged offer. In view of this fact, the True Bill is fatally defective.

This defective True Bill violates the right of the Petitioner to due process of law in two respects:

First, due process of law requires that one accused of a crime be fully apprised of the nature of the charge brought against him. The Indictment must contain an allegation of every essential element of the crime with which he is charged, in order that he may prepare his defense (*Salinas* v. *United States*, 277 Fed. (2d) 914 (9th Cir., 1960); *United States* v. *Debrow*, 346 U.S. 374 [1953]). In the present case, the True Bill fails to state every essential element of the crime charged. It fails to state where, when and with what intent the offer was made. These omissions prevent the Petitioner from being able to prepare a defense to the charge.

Second, a defective Indictment fails to confer jurisdiction upon the Court. *In Re; Carlson*, 176 Wis. 538; 186 N.W. 722 [1922]). A fundamental concept of due process is the Court which tries the accused must have jurisdiction over the person and subject matter. *United States* v. *Certain Parcels of Land*, 40 Fed. Supp. 436 [1941].

Accordingly, the Indictment should be dismissed.

CONCLUSION

For the foregoing reasons, it is submitted that this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

STATE OF WISCONSIN
IN SUPREME COURT

The State of Wisconsin upon the
relation of Howard J. Meister
—v—
The Circuit Court of Dane County
and the Honorable Edwin M. Wilkie,
Circuit Judge, presiding

ORDER GRANTING STAY OF ARRAIGNMENT.
(Filed Sep. 28, 1966)

The Relator having filed an application for writ of prohibition on Monday, September 26, 1966 and this honorable court having considered the matter, having heard arguments advanced on behalf of Relator, and having denied said application for such writ;

The Court being advised of the affidavit and the petition filed herein requesting a stay of proceedings in the case of State of Wisconsin v. Howard J. Meister now pending before the Circuit Court of Dane County, so that the Relator may make application to the United States Supreme Court for a writ of certiorari;

Now, therefore, it is ordered that the arraignment of Howard J. Meister in said Circuit Court of Dane County be and the same is hereby stayed until after October 13, 1966.

Dated at Madison, Wisconsin this 28th day of September, 1966.

SUPREME COURT:
By: *E. Harold Hallows*
Justice E. Harold Hallows
Supreme Court Justice presiding

APPENDIX B

STATE OF WISCONSIN CIRCUIT COURT DANA COUNTY

STATE OF WISCONSIN,
Plaintiff,

vs.

HOWARD J. MEISTER,
Defendant.

TRUE BILL.

State of Wisconsin }
County of Dane } ss.

The Jurors of the Grand Jury having been duly chosen, selected, summoned, impaneled and charged to inquire for the State of Wisconsin in and for Dane County by Richard W. Bardwell, Judge of said County and State at the January, 1966 term of Court and further, the said Court having ordered this same said Grand Jury to continue to so function during the April, 1966 term of Court, in the name of and by order of the State of Wisconsin, do upon their oaths present:

That heretofore, to-wit: on or about the 29th day of June, 1965 in the City of Madison, Dane County, Wisconsin and in the State Capitol Building, Howard J. Meister, then and there the president of the West Side Bank of Milwaukee, did direct Dorothy Effinger, who at said time and place was employed as a lobbyist by the said Howard J. Meister and registered with the Secretary of State of the State of Wisconsin as such, to offer to Earl Elfers, then and there a public officer, to-wit: an Assemblyman in the Wisconsin

Legislature, a sum of money which the said Earl Elfers was not then and there authorized to receive, with intent to influence the conduct of said Earl Elfers in relation to a matter which by law was then pending before the said Earl Elfers in his capacity as such officer, to-wit: Bill 420-A, and that the said Dorothy Effinger, pursuant to the said direction by the said Howard J. Meister, did make such offer to the said Earl Elfers.

That said acts as herein stated being contrary to Section 946.10 Wisconsin Statutes in such case made and provided and against the peace and dignity of the State of Wisconsin.

A True Bill

/s/ *William R. Schweers*
Foreman of the Grand Jury
in and for Dane County,
Wisconsin

Michael B. Torphy, Jr.
Michael B. Torphy, Jr.
District Attorney, Dane County, Wis.

Dated this 11th day of June, 1966.

APPENDIX C

"939.05 *Parties to crime.* (1) Whoever is concerned in the commission of a crime is a principal and may be charged with and convicted of the commission of the crime although he did not directly commit it and although the person who directly committed it has not been convicted or has been convicted of some other degree of the crime or of some other crime based on the same act.

(2) A person is concerned in the commission of the crime if he:

(a) Directly commits the crime; or

(b) Intentionally aids and abets the commission of it; or

(c) Is a party to a conspiracy with another to commit it or advises, hires, counsels or otherwise procures another to commit it. Such a party is also concerned in the commission of any other crime which is committed in pursuance of the intended crime and which under the circumstances is a natural and probable consequence of the intended crime. This paragraph does not apply to a person who voluntarily changes his mind and no longer desires that the crime be committed and notifies the other parties concerned of his withdrawal within a reasonable time before the commission of the crime so as to allow the others also to withdraw.

"939.30 *Solicitation.* Whoever, with intent that a felony be committed, advises another to commit that crime under circumstances which indicate unequivocally that he has such intent may be fined not more than $2,500 or imprisoned not to exceed the maximum provided for the completed crime, but in no event to exceed 5 years, or both; except

that for a solicitation to commit a crime for which the penalty is life imprisonment the actor may be imprisoned not more than 10 years."

"946.10 *Bribery of public officers and employes.* Either of the following may be fined not more than $1,000 or imprisoned not more than 5 years or both:

(1) Whoever, with intent to influence the conduct of any public officer or public employe in relation to any matter which by law is pending or might come before him in his capacity as such officer or employe or with intent to induce him to do or omit to do any act in violation of his lawful duty transfers or promises to him or on his behalf any property or any personal advantage which he is not authorized to receive; or

(2) Any public officer or public employe who directly or indirectly accepts or offers to accept any property or any personal advantage, which he is not authorized to receive, pursuant to an understanding that he will act in a certain manner in relation to any matter which by law is pending or might come before him in his capacity as such officer or employe or that he will do or omit to do any act in violation of his lawful duty."